No. 88-554

Supreme Court, U.S.
FILED
SEP 28 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

BILL CLINTON, GOVERNOR OF ARKANSAS,
BILL MCCUEN, SECRETARY OF STATE OF ARKANSAS, AND
STEVE CLARK, ATTORNEY GENERAL OF ARKANSAS,
IN THEIR RESPECTIVE OFFICIAL CAPACITIES AND IN
THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE
BOARD OF APPORTIONMENT OF THE STATE OF ARKANSAS;
LILBURN W. CARLISLE, CHAIRPERSON OF THE ARKANSAS
STATE COMMITTEE OF THE DEMOCRATIC PARTY;
TOMMYE S. GIVENS, SECRETARY OF THE ARKANSAS
STATE COMMITTEE OF THE DEMOCRATIC PARTY; THE
DEMOCRATIC CENTRAL COMMITTEE OF CRITTENDEN
COUNTY, ARKANSAS, ITS OFFICERS AND MEMBERS; THE
REPUBLICAN CENTRAL COMMITTEE OF CRITTENDEN
COUNTY, ARKANSAS, ITS OFFICERS AND MEMBERS; AND
THE ELECTION COMMISSION OF CRITTENDEN COUNTY,
ARKANSAS, ITS OFFICERS AND MEMBERS ..... *Petitioners*

vs.

ELBERT SMITH, VICKIE MILES ROBERTSON,
JOHNNY MAE WILLIAMS, MAXINE BOHANNON, CAROLYN
STEPHENSON, ESTER CAGE, FAYE WILLIAMS, DARRICK
HANDY, ANTHONY R. HOLMES, CAROL HOLMES,
AND MAGGIE HALL ..... *Respondents*

APPEAL FROM
THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

JURISDICTIONAL STATEMENT

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56 pp

QUESTIONS PRESENTED

I.

WHETHER THE COURT BELOW IMPROPERLY PERMITTED A CLAIM UNDER SECTION II OF THE VOTING RIGHTS ACT OF 1965, AS AMENDED, 42 U.S.C. §1973, TO BE MAINTAINED AGAINST ONE DISTRICT OF A STATEWIDE ELECTION SYSTEM AS DISTINGUISHED FROM THE ENTIRE SYSTEM ITSELF.

II.

WHETHER THE COURT BELOW IMPROPERLY EXPEDITED THIS ACTION AND CONDUCTED A TRIAL ON THE MERITS LESS THAN THREE AND ONE HALF MONTHS AFTER PLAINTIFFS FILED THEIR COMPLAINT, THUS DEPRIVING PETITIONERS OF AN OPPORTUNITY TO PREPARE ADEQUATELY.

III.

WHETHER THE COURT BELOW IMPROPERLY BASED ITS FINDING THAT THE MULTIMEMBER LEGISLATIVE DISTRICT VIOLATED SECTION II OF THE VOTING RIGHTS ACT SOLELY UPON EVIDENCE OF RACIALLY POLARIZED VOTING IN EIGHT BLACK VERSUS WHITE ELECTIONS AND UPON THE FACT THAT NO BLACK HAD PREVIOUSLY WON A SEAT IN THE ARKANSAS HOUSE OF REPRESENTATIVES FROM THE DISTRICT IN ISSUE.

IV.

WHETHER THE COURT IMPROPERLY VOIDED THE MARCH 8, 1988 PRIMARY ELECTION AND ORDERED A SPECIAL PRIMARY ELECTION, WHICH IS TO BE HELD ON SEPTEMBER 20, 1988. WHEN THERE WAS NO

EVIDENCE OF RACIAL DISCRIMINATION IN THE ELECTORAL PROCESS IN QUESTION AND THERE WAS NO EVIDENCE OF LOW VOTER PARTICIPATION IN THE BLACK COMMUNITY.

V.

WHETHER THE COURT BELOW IMPROPERLY ADDED NEW PARTIES DEFENDANT, SUA SPONTE, IN ITS JULY 1, 1988 JUDGMENT WHEN THOSE NEW DEFENDANTS HAD NOT PARTICIPATED IN ANY OF THE PROCEEDINGS PRIOR TO THE ENTRY OF JUDGMENT.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption of this action, the following are parties to this proceeding:

Democratic Central Committee of Crittenden County, Arkansas: Solon Anthony, Howard Atkins, Primo Baioni, Jimmy Barham, Earl Beck, Al Boals, Cy Bond, Darla Brasfield, Ollie Brown, Milio Brunetti, Buddy Burgos, John Criner, Zelma Danton, Berrell Fair, Frank Fogleman, John Gregson, Frank Hill, Paul Matthews, Paul O'Neal, June Paudert, Mack Ray, Marvin Rogers, Mike Sample, Dave Thomas, Charlie Wah, Erma Whitacre, and Marge Woolfolk.

Republican Central Committee of Crittenden County, Arkansas: Joe Baker and Mrs. Barbara Dodge.

Election Commission of Crittenden County, Arkansas: Joe Baker, Kent Rubens, and David Thomas.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

BILL CLINTON, GOVERNOR OF ARKANSAS, BILL MCCUEN, SECRETARY OF STATE OF ARKANSAS, AND STEVE CLARK, ATTORNEY GENERAL OF ARKANSAS, IN THEIR RESPECTIVE OFFICIAL CAPACITIES AND IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE BOARD OF APPORTIONMENT OF THE STATE OF ARKANSAS; LILBURN W. CARLISLE, CHAIRPERSON OF THE ARKANSAS STATE COMMITTEE OF THE DEMOCRATIC PARTY; TOMMYE S. GIVENS, SECRETARY OF THE ARKANSAS STATE COMMITTEE OF THE DEMOCRATIC PARTY; THE DEMOCRATIC CENTRAL COMMITTEE OF CRITTENDEN COUNTY, ARKANSAS, ITS OFFICERS AND MEMBERS; THE REPUBLICAN CENTRAL COMMITTEE OF CRITTENDEN COUNTY, ARKANSAS, ITS OFFICERS AND MEMBERS; AND THE ELECTION COMMISSION OF CRITTENDEN COUNTY, ARKANSAS, ITS OFFICERS AND MEMBERS ..... *Petitioners*

VS.

ELBERT SMITH, VICKIE MILES ROBERTSON, JOHNNY MAE WILLIAMS, MAXINE BOHANNON, CAROLYN STEPHENSON, ESTER CAGE, FAYE WILLIAMS, DARRICK HANDY, ANTHONY R. HOLMES, CAROL HOLMES, AND MAGGIE HALL ..... *Respondents*

APPEAL FROM
THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the District Court is as yet unreported and is included herein in the Appendix.

GROUNDS OF JURISDICTION OF SUPREME COURT

This is an appeal from the judgment in an action arising under the Voting Rights Act of 1965, 42 U.S.C. §1973, and the Fourteenth and Fifteenth Amendments to the United States Constitution. Respondents challenged the multimember district used to elect two members of the Arkansas House of Representatives from Crittenden County, Arkansas, on the ground that the at-large system of voting for the two representatives from that district unlawfully diluted black voting strength. Jurisdiction is conferred on the three-judge district court by 28 U.S.C. §§1331, 1343(3) and (4), 42 U.S.C. §1973j(f), and 28 U.S.C. §§2201, 2202. Judgment of the District Court was entered on July 1, 1988. Timely notice of appeal was filed on July 29, 1988, in the Supreme Court of the United States. Jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, Section 1253.

STATUTE IN ISSUE

The statute in issue is 42 U.S.C. §1973, which provides:

"(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

"(b) A violation of subsection (a) of this section is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."

STATEMENT OF THE CASE

The respondents are black residents of Crittenden County, Arkansas. Petitioners are the Governor, Secretary of State, and the Attorney General of Arkansas, officials of the Democratic and Republican Parties of Arkansas, and the Election Commission of Crittenden County, Arkansas. Respondents filed their complaint on January 15, 1988, which challenged the multimember structure of the Arkansas Legislature's District 48-49 of the Arkansas House of Representatives. Respondents claimed the two-member legislative district violated Seciton II of the Voting Rights Act of 1965 (42 U.S.C. §1973 *et seq.*) and the Fourteenth and Fifteenth Amendments to the United States Constitution. They asked for a declaratory judgment that District 48-49 violated those statutory and constitutional provisions, and requested that the court enjoin the primary election in Arkansas, which was scheduled for March 8, 1988. Alternatively, respondents asked the court to void the results of that election and order a new election.

Petitioners denied any statutory or constitutional violation. They also raised the defense of laches because respondents filed their lawsuit virtually on the eve of the upcoming primary election even though the districting scheme in question had been in effect for more than seven years, having had three elections held under it. Petitioners also contended that the action was barred by the applicable statute of limitation, and that Section II, as well as the constitutional protections asserted by respondents, did not permit challenges to single districts out of state-wide apportionment plans. Respondents' motion to enjoin the March 8, 1988 election was denied on February 16, 1988 following an evidentiary hearing. The court primarily based its denial of that motion on the doctrine of laches because, even though the apportionment scheme had been in effect since July 13, 1981, respondents had waited for more than seven years to challenge it. Reapportionment occurs every ten years in Arkansas, following each

Federal census. Ark. Const. art. 8, section 4.

On March 10, 1988, the court notified the parties that the case was set for trial 46 days later, on April 25, 1988. After it became apparent that petitioners' experts required additional time to prepare, petitioners moved for continuance of the trial on April 18, 1988. The trial court denied that motion.

Following the April 25-26 trial, the three-judge court issued its opinion on May 16, 1988, in which it found that there was no discriminatory intent in the formation of District 48-49. Therefore, the Court held there was no constitutional violation in the creation or maintenance of that district.

However, the Court did find that the district, as drawn, effectively "deprives black citizens of an equal opportunity to participate in the political process and to elect candidates of their choice," thus violating Section II of the Voting Rights Act. That finding was based upon evidence that voting in the district was racially polarized when black candidates ran against white candidates and that minority group members have not won elections in proportion to their numbers in the population. The court held these to be the "essential elements of [respondents'] claim," and discounted the other factors that should have been considered in deciding whether a violation of Section II existed.

During the two-day trial, respondents presented evidence, based on 1980 census data, that approximatley 42 percent of the population of the district in issue was black, and that 37 percent of the voting age population was black. It was stipulated that no black person had been elected to the Arkansas House of Representatives from the district. A Mr. Allen Lichtman, an expert witness for respondents, evaluated a total of eight races in which black candidates ran against white candidates during the years 1978, 1982, 1985, 1986, and 1988. One of those races was the 1988 Democratic

Presidential primary in which Jesse Jackson was a candidate. Based on the voting patterns in those eight races, Lichtman testified that the voters were severely polarized and that racial block voting was present within the district. Respondents produced no evidence that blacks in the district were hindered from participating fully in the electoral process.

Petitioners' expert, Dr. Harold Stanley, evaluated 65 other races within the district in which there were no black candidates. In 54 of those races, the black-preferred candidate was elected. Petitioners presented additional evidence of vigorous political participation by blacks in the district's political processes, including evidence that blacks were registered to vote in greater proportion to their total population than were whites.

Based on this evidence, the court below found a violation of Section II of the Voting Rights Act. The court took judicial notice of a history of racial discrimination in the electoral process in Arkansas, and inferred that such history necessarily inhibited full participation in the political process by blacks. However, the court did find that the district in issue was not unusually large, that there was no discriminatory intent in the formation of the district, that there was no present lack of responsiveness to the needs of blacks in the district, and that no overt or subtle racial appeals had been made in elections within the district. Accordingly, no constitutional violation was found.

In its May 16 opinion, the court held that the May 8, 1988 primary election for state representative should be set aside and that District 48-49 should be split into two separate districts in time for a special primary election to be held before the November, 1988 general election. After a hearing on June 6, 1988, the court issued its final judgment on July 1, 1988. It ordered that a plan submitted by the respondents, which split District 48-49 into two separate districts, be adopted and that a

special election be held on September 20, 1988, with a primary runoff (should one be necessary) on October 4, 1988. The court further ordered that several local party officials and the two local political party branches in Crittenden County be added as defendants to effectuate its order. On July 7, 1988, the court issued another opinion explaining that it adopted the respondents' districting plan, which included one district that was to be approximately 65% black, because it felt, based on national data, that such a super-majority was necessary to give blacks a fair opportunity to elect the candidates of their choice. The court noted that petitioners had stated that any plan that split the district would interfere with the state-wide scheme of apportionment.

After the liability finding, petitioners filed an alternative motion for new trial or motion to dismiss for failure to state a claim for relief, which was based on the issues raised in this appeal. The court denied petitioner's motion. Final judgment was entered July 1, 1988. Petitioners filed their notice of appeal to the Supreme Court on July 29, 1988, and requested a stay from the trial court on the same date. The stay request was denied on August 3, 1988.

SUBSTANTIALITY OF FEDERAL QUESTIONS

This appeal presents important and substantial questions, as hereinafter described, in that it presents this Court with an opportunity to clarify several of the issues clouded by the severely divided Court in *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). One such issue is the standard for determining voter polarization, an important consideration by the court in *Thornburg*. Petitioners argue that a majority of the *Thornburg* court did not limit evidence for polarization to just black/white contests, nor did it indicate polarization in that subset of election contests could not be overcome by evidence of lack of polarization in the pattern of all election contests. Different lower courts have taken different views of this issue. Compare, *Collins v. City of Norfork*, 679 F.Supp. 557 (E.D.Va. 1988), with *Citizens for a Better Gretna v. Gretna*, 834 F.2d 496 (5th Cir. 1987).

The Court in *Thornburg* defined legally significant polarization as occurring when "a white bloc vote normally [defeats] the combined strength of minority support plus white cross over votes." 106 S.Ct. at 2770. The critical portion of the Court's opinion for the issues raised in this case is Part III. C. entitled "Evidence of Racially Polarized Voting." There was no majority view as to what evidence is relevant to the determination. The primary disagreement, however, was not whether voter behavior in white/white contests was relevant. That issue was not before the Court because neither party had introduced such evidence at trial. Rather the disagreement among the justices concerned the significance of the reasons that black and white voters voted differently.

The state in *Thornburg* claimed that the plaintiffs had to establish that candidates supported by black voters were rejected because of their identification with the black community; that absent further analysis, plaintiffs could not demonstrate that the difference in support was not explainable

by non-racial factors. Defendants argued that the bivariate analysis should have been a multivariate analysis. A plurality of the Court supported Justice Brennan's view that a bivariate analysis was sufficient. Voter behavior, not the reasons for that behavior, was what mattered.

Five members of the Court disagreed with Justice Brennan on this point. Justice O'Connor spoke for herself and three others when she said "I do not agree, however, that such evidence [evidence of why white voters voted as they did] can never affect the overall vote dilution inquiry. Evidence that a candidate preferred by the minority group in a particular election was rejected for reasons other than those which made the candidate the preferred choice of the minority groups would seem clearly relevant in answering the question whether bloc voting by white voters will consistently defeat minority candidates. Such evidence would suggest that another candidate, equally preferred by the minority group, might be able to attract greater white support in future elections." 92 L.Ed.2d at 78-79.

Justice White held the tie-breaking vote on this issue. He, too, disagreed with Justice Brennan on the relevance of matters other than the mere difference in voter behavior in determining the existence of polarized voting. He gave an example in which black candidates who are not the candidates of choice of the black community are elected in a contest with white candidates. He apparently would not find this to be a racially polarized contest, noting that such a view of polarization would result in "interest group politics rather than a rule hedging against racial discrimination." 92 L.Ed.2d at 68.

On the issue of the relevance of "white-white" contests, Justice Brennan specifically indicated that it was the status of the candidate as a chosen representative of a particular racial group, not the race of the candidate that was important. To take the position that blacks were deprived of equal partici-

pation unless they could elect any black candidate they preferred, even though they consistently elected white candidates who solicited their votes and were responsive to their needs, fostered "interest group" politics, not anti-discrimination.

In *Collins v. City of Norfork*, 679 F.Supp. 557 (E.D.Va. 1988), the court clearly adopted the view that outcomes in election contests of "white-white" races were relevant:

> "The Supreme Court clearly contemplates that a candidate of choice of the black community may be of any race, and need not be black, as it consistently refers to the minority's preferred candidate, or candidate of choice, rather than the minority candidate. . . . No justice said that a black preferred candidate must be black."

Id. at 572.

The *Collins* court found that the black-preferred candidates had been proportionately elected. Had the court in the instant case applied a similar standard concerning the "black preferred candidates," it would have been compelled to conclude that black voters in District 48-49 have achieved proportional election of those candidates. The uncontroverted testimony of defendants' expert witness, Dr. Harold Stanley, established that since its creation in 1981, District 48-49 has been represented by at least one House member who was the preferred candidate of a majority of black voters. Utilizing this Court's district-wide perspective, this success constitutes more than proportional representation for the district's black voters who have elected fifty percent of the representatives but are only thirty-five percent of the district's voters.

This issue will be central in almost all future cases under Section II. The question of whether one-race elections can be ignored and total reliance placed on black/white elections

must be answered by this Court. This appeal presents the opportunity for it to do so.

Other issues to be raised on appeal include whether a Section II claim can be brought in the context of challenging just one district rather than an entire apportionment scheme of a state; whether the unnecessarily short time for trial deprived defendants of an opportunity to adequately prepare for trial and thus deprived the court of the searching inquiry necessary to find a Section II violation; and whether the court can ignore the Senate factors and decide a Section II claim based strictly on the existence of racially polarized bloc voting in black-versus-white races and depressed socioeconomic status for blacks. These are all important and, in some instances, frequently raised issues in Section II cases. Courts, Section II litigants and potential litigants need guidance on these matters to be able to resolve these cases properly.

A second important and substantial question concerns the remedy imposed by the court below. As a remedy for the violations of Section II it found, the lower court ordered that the March 8 primary in District 48-49 be declared null and void and that a special election be held to fill seats 48 and 49 pursuant to the new districting plan it adopted. The imposition of such a remedy by a federal court has been described by the Fifth Circuit Court of Appeals as "drastic, if not staggering." *Bell v. Southwell*, 376 F.2d 659, 662 (5th Cir. 1967). The voiding of a state election is "a form of relief to be guardedly exercised." *Id.*, citing *Hamer v. Campbell*, 358 F.2d 215 (5th Cir. 1966) cert denied 385 U.S. 851, 87 S.Ct. 76, 17 L.Ed.2d 79 (1966). Indeed, the court in *Bell* would approve such relief only after it found the nature of the violation there "gross, spectacular, [and] completely indefensible." *Id.* at 664. The general rule is to deny relief with respect to past elections, enjoining only future elections. *Hinden v. North Carolina State Board of Elections*, 710 F.2d 177 (4th Cir. 1983). Where there is no evidence that election officials practiced invidious discrimination or

egregious conduct in holding elections, setting aside past elections is not justified. *U.S. v. Louisville Municipal School District*, 557 F.Supp. 1168, 1172 (N.D. Miss. 1983).

In deciding matters of relief,

> "Courts will consider granting post-election relief only where the plaintiffs were not aware of a major problem prior to the election or where by the nature of the case they had no opportunity to seek pre-election relief."

Hart v. King, 470 F.Supp. 1195 (D. Hawaii 1979). Indeed, plaintiffs' diligence in asserting timely claims prior to election is an important factor in determining whether an election should be set aside. *Coalition for Education, District 1 v. Board of Elections of the City of New York*, 370 F.Supp. 42 (S.D.N.Y. 1974), aff'd 495 F.2d 1090 (2d Cir. 1974). Parties having grievances based on discriminatory election practices have a duty to bring the grievances forward promptly for pre-election adjudication. *Toney v. White*, 488 F.2d 310, 314 (5th Cir. 1973). Plaintiffs who fail to make timely challenges to elections, when the information upon which they make their case is available to them prior to the election, cannot have those elections voided as part of their relief. *Tucker v. Burford*, 603 F.Supp. 276 (N.D. Miss. 1985). In such instances, plaintiffs have waived their right to such relief. *Id.* at 279.

In the case at bar, the apportionment plan that created District 48-49 was adopted on July 13, 1981. Section II of the Voting Rights Act was amended in the spring of 1982, to allow the use of the "results test." Numerous actions against state apportionment plans were instituted within months of the amendment's passage. *See, e.g., Gingles v. Edmisten*, 590 F.Supp. 345 (N.D. N.C. 1984), *Major v. Treen*, 547 F.Supp. 325 (E.D.La. 1983). However, the respondents in this action waited through three elections under the apportionment plan in issue until the eve of the fourth election to challenge it. Other than

with regard to the March 8 primary election, no facts were presented by the respondents that were not in existence shortly after the 1986 Primary. Indeed, all the census data relied upon by respondents was from the 1980 decennial census.

Certainly, this is not the diligence required of Section II plaintiffs in order for them to obtain the drastic remedy of voiding a past election. All the facts respondents needed to file this lawsuit were available early in the 1980s so that the suit could have been filed and the merits adjudicated prior to the 1988 elections. The respondents, having failed to exercise diligence in this regard, have waived their right to the extraordinary relief of voiding a state election.

Furthermore, the findings of the court indicate that the election voided by the court was not marked by invidious discrimination or such egregious conduct by election officials that it should have been set aside. Indeed, the court specifically found that there was no discriminatory intent in the formation of District 48-49 and that there was no present lack of responsiveness to the needs of blacks on the part of officials in the district. Additionally, the court found that there was no indication of overt or subtle racial appeals in campaigns in the district. Finally, there is no indication in the record that election officials in the district engaged in any discriminatory practices. That being the case, the extreme, drastic and highly disfavored remedy of voiding the election and calling a special election is certainly not proper in this case.

CONCLUSION

For the reasons stated above, petitioners submit that this appeal brings before the Court substantial and important federal questions which require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Dated Sept. 27, 1988.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John Steven Clark, Attorney General, do hereby certify that I have served the foregoing by mailing a copy of same, U.S. Mail, postage prepaid, to the following counsel, on this 27th day of September, 1988.

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

Elbert Smith, Vickie Miles Robertson, Johnny Mae Williams, Maxine Bohannon, Carolyn Stephenson, Ester Cage, Faye Williams, Darrick Handy, Anthony R. Holmes, Carol Holmes, and Maggie Hall, on behalf of themselves, and all others similarly situated ..... *Plaintiffs*

vs. CIVIL ACTION
NO. LRC 88-29

Bill Clinton, Governor of Arkansas; Bill McCuen, Secretary of State of Arkansas; and Steve Clark, Attorney General of Arkansas, in their respective official capacities and in their official capacities as members of the Board of Apportionment of the State of Arkansas; Lilburn W. Carlisle, Chairperson of the Arkansas State Committee of the Democratic Party; Tommye S. Givens, Secretary of the Arkansas State Committee of the Democratic Party; Ed Bethune, Chairperson of the Arkansas State Committee of the Republican Party; and Phyllis Kincannon, Secretary of the Arkansas State Committee of the Republican Party ..... *Defendants*

Before ARNOLD, Circuit Judge, HARRIS, Senior District Judge, and WOODS, District Judge.

ARNOLD, Circuit Judge.

The issue in this case is whether at-large voting for two seats in the Arkansas House of Representatives from dual-

member District 48-49 in Crittenden County denies black voters an equal opportunity to participate in the political process, in violation of section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973.[1]

We have made a careful, practical assessment of the impact of the challenged multimember structure, "in the light of past and present reality, political and otherwise." See *White v. Regester*, 412 U.S. 755, 769-70 (1973). We now hold that the plaintiffs have demonstrated a violation of their rights under federal law. The crux of our decision is this: at-large election of representatives in this multimember structure so dilutes the voting strength of black residents of the district as virtually to guarantee that no black person will ever be elected State Representative in Crittenden County.

The Court also finds that it is feasible to divide District 48-49 into two contiguous, rationally sized legislative districts, with black voters in the majority in one of the districts. Accordingly, we hold that the March 8, 1988 primary election for State Representative from the district must be set aside, and a plan to divide District 48-49 into two districts must be implemented in time for a special primary election to be held before the November 1988 general election. The order of this Court is intended to affect no portion of the Arkansas legislative apportionment structure except that in District 48-49.

I.

Members of the Arkansas House of Representatives are elected every two years for two-year terms. Ark. Const. Art. V, §2. Candidates for the Legislature must obtain a majority of the vote in order to win party nomination. Ark. Code Ann.

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[1]On April 26, 1988, at the end of a two-day trial, we announced findings and conclusions from the bench, stating that a formal opinion would be filed in due course. This is that opinion.

§§7-7-102(a), 7-7-304(2) (1987). If no candidate receives a majority of votes in the primary, a run-off election is held. Ark. Code. Ann. §7-7-304(3) (1987). The parties have stipulated that seventy-four of the one hundred members of the State House of Representatives are elected from single-member districts.

House District 48-49 is a single geographic entity from which two State Representatives are elected through at-large voting. Candidates designate District 48 or District 49 as the seat for which they choose to run. District 48-49 is located entirely within Crittenden County, and encompasses most of the county's area and ninety-four percent of its population. There is no subdistrict-residency requirement for State Representative candidates.

According to estimates based on 1980 census data, approximately forty-two percent of the population of District 48-49 is black, and about thirty-seven percent of the district residents who are of voting age are black. No black candidate has ever been elected State Representative from District 48-49; nor has any black person been elected to the Arkansas General Assembly from Crittenden County in the Twentieth Century.

Plaintiffs Elbert Smith and others, black registered voters in District 48-49, filed this action on January 15, 1988, challenging on statutory and constitutional grounds the multimember structure of the district. The defendants include the Governor, Secretary of State, and Attorney General of Arkansas (members of the State Board of Apportionment), and the principal officers of the Democratic and Republican parties in the State. Plaintiffs alleged that the multimember legislative district adversely affects the opportunity for black residents to participate in the political process, in violation of the Voting Rights Act of 1965, the Fourteenth and Fifteenth Amendments to the United States Constitution, and 42 U.S.C. §1983. The plaintiffs also moved to enjoin the March 8, 1988 primary election for State Representatives from the district.

On February 16, 1988, this Court held a hearing on the plaintiffs' motion for a preliminary injunction. After hearing evidence for a day, we denied the motion, stating our reasons from the bench. The plaintiffs, we said, had shown a strong likelihood of success on the merits, but we could not say at that early stage of the case that defendants' chances were negligible. Candidates had already filed and done a good deal of campaigning. It seemed best to let the election be held, subject always to our ability to set it aside, if plaintiffs should win at the trial on the merits, in time to re-run the election in single-member districts in 1988. In making this decision we were heavily influenced by a reluctance to interfere with state election processes on less than a full record.

So the primary election[2] was held on March 8. State Representative Lloyd McCuiston, who is white, ran for one seat without opposition, and he was renominated. State Representative James Stockley, who is white, defeated Ben McGee, who is black, for the nomination for the other seat. The trial on the merits of this case followed on April 25 and 26.

II.

Initially, we address the defendants' contention that we need not reach the merits of this case. The defendants suggest that the plaintiffs are barred because of the passage of time since the State Board of Apportionment formulated the present state-wide plan in 1981. The necessary premise of this argument is that unless voters challenge an apportionment plan promptly upon its being put into effect, they are barred from contesting a district until a subsequent reapportion-

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[2]We refer to the Democratic primary. No one filed for the Republican nomination for either seat.

ment.[3] We conclude that neither the doctrine of laches nor the expiration of an applicable limitations period presents an obstacle to the plaintiffs' case under the Voting Rights Act. First, the injury alleged by the plaintiffs is continuing, suffered anew each time a State Representative election is held under the multimember structure. Second, there have been significant developments since the 1981 Arkansas reapportionment. The Voting Rights Act was amended in 1982, and the Supreme Court's interpretation of the statute in *Thornburg v. Gingles*, 106 S. Ct. 2752 (1986), lays down a rather uncompromising structure for the application of the law in vote-dilution cases. Third, we note that the plaintiffs are required to prove that, as a result of the challenged structure, a white majority bloc is usually able to defeat the preferred candidates of the minority. Of course, evidence of this circumstance would be unavailable unless the structure had been in place for some time.

It is suggested that the complaint should be dismissed because indispensable parties have not been joined, those parties being the members of the State Legislature affected by the case. There is no question that they are affected, but we do not believe that they are indispensable in the legal sense. It was open to members of the Legislature to intervene and become parties, if they wished to do so. Both of them have been in the courtroom throughout this case, and one of them testified. In any event, their legal interests have been considered just as fully as if they were parties.

The defendants next contend that the plaintiffs may not

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[3]The defendants have not indicated what they believe is the applicable limitations period. Arkansas law provides that the State shall be reapportioned in the year following each federal census, and that this apportionment is effective unless contested in the State Supreme Court within 30 days. Ark. Const. Art. VIII, §§4, 5. We do not believe this time frame for a special remedy under state law is of consequence under the Voting Rights Act, and the defendants do not so contend.

challenge one district out of the whole state reapportionment plan. Plaintiffs, they say, must either challenge the whole plan or state that they have no objection to any part of it other than District 48-49. This argument, too, is without merit: assuming that there is a State policy that would require a suit filed in State court to challenge the whole plan or not at all, see *Bizzell v. White*, 274 Ark. 511, 625 S.W.2d 528 (1981) (per curiam) (4-3 decision), such a policy would not govern the application of federal law by a federal court. If the plaintiffs are injured by a particular aspect of the plan and are not affected at all by the rest of it, there is no reason why they should not be allowed to challenge the aspect of the plan that affects them.[4] Indeed, they would presumably lack standing under Article III to challenge aspects of the plan (for example, multi-member districts in other parts of the State) that do not affect them at all.[5]

Accordingly, we proceed to discuss the law applicable to the merits of this case.

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[4]The Arkansas Supreme Court's opinion in *Bizzell*, in any case, rests in part on one factor not present here. The challenge made there was to a single Senate District, but if the challenge had been upheld, the boundary lines of that district would have had to be re-drawn, necessarily producing a "ripple effect" on some other districts. No such argument is possible here. Plaintiffs seek relief only within District 48-49. The outer boundaries of that district, which will now become two districts, will not be affected.

[5]Defendants moved for a continuance one week before trial. We denied the motion. Defendants had ample notice of the trial setting, and time was important in getting this case decided during 1988. The main ground of the motion was the need for more time to develop expert testimony. At trial, defendants in fact presented creditable and reputable expert testimony. Their lack of success is due to the legal standard laid down in *Thornburg*. We do not believe that additional time would have enabled defendants to improve their case materially. Their side was well and fully presented, within the rather strict limits of the law.

We also deny plaintiffs' motion for class certification. It was not filed within ninety days of the complaint, as required by E.D. Ark. R. 24. This action makes little if any practical difference.

III.

Section 2 of the Voting Rights Act of 1965, as amended and codified, reads as follows:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

U.S.C. §1973.

Congress amended Section 2 in 1982 to make clear that a violation of the Act may be established by a showing of discriminatory effect stemming from an electoral mechanism; it is not necessary that minority voters prove that the system was adopted or has been maintained for a discriminatory

purpose. *Thornburg*, 106 S. Ct. at 2759; S. Rep. No. 417, 97th Cong., 2d Sess. 28 (hereafter S. Rep.), *reprinted in* 1982 U.S. Code Cong. & Admin. News 177, 205.

In determining whether the Act has been violated, we may consider the following typical factors suggested by the Senate Judiciary Committee Report:

1. the extent of any history of official discrimination in the state or political subdivision that touched on the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

S. Rep. at 28-29, *reprinted in* 1982 U.S. Code Cong. & Admin. News at 206-07.

Other factors we may consider include whether there is a significant lack of responsiveness to the particularized needs of the minority group and whether the policy underlying the election practice or procedure is tenuous. *Id.*

This Court is required to consider all of the circumstances and applicable factors to answer the ultimate question: "whether[,] 'as a result of the challenged practice or structure[,] plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice'." *Thornburg*, 106 S. Ct. at 2763 (quoting S. Rep. at 28, *reprinted in* 1982 U.S. Code Cong. & Admin. News at 206). Plaintiffs are not required to prove the existence of any certain number of the factors listed above, nor are they required to show that a majority of the factors " 'point one way or the other'." *Id.* at 2764 (quoting S. Rep. at 29, *reprinted in* 1982 U.S. Code Cong. & Admin. News at 207).

We must conduct a "searching practical evaluation of the 'past and present reality'." S. Rep. at 30, *reprinted in* 1982 U.S. Code Cong. & Admin. News at 208. In the context of vote-dilution cases, this evaluation is shaped by consideration of three circumstances. *First*, the black voters must show that their numbers are sufficiently large and geographically compact to constitute a majority in a single-member district. *Thornburg*, 106 S. Ct. at 2766. *Second*, the plaintiffs must show that the group to which they belong is politically cohesive. *Id.* at 2767. *Third*, the black voters must show that "the white majority votes sufficiently as a bloc to enable it — in the absence of special circumstances, such as the minority candidate running unopposed . . . usually to defeat the minority's preferred candidate." *Ibid.* The latter two of these factors may be demonstrated by a showing that voting in the jurisdiction is highly racially polarized. *Id.* at 2769.

With this legal framework in mind, we turn now to the facts developed during the trial of this case.

IV.

A.

The plaintiffs have submitted a proposed plan for division of District 48-49 into two separate districts, in one of which blacks would constitute about sixty-one percent of the voting-age population and sixty-five percent of the overall population. The defendants do not contest the fact that such a district could be created. Accordingly, we find that the black population in District 48-49 is sufficiently large and compact so that a separate district with black voters in the majority could be created. At this time we express no view as to the merit, relative to any other plan that might be developed, of the plan submitted by the plaintiffs.

B.

The plaintiffs have offered the report and testimony of an expert witness, Dr. Allan Lichtman, as to the extent of racially polarized voting in the district and county. The report summarizes a study of nine of the elections involving black candidates in Crittenden County since 1978. Using regression analysis[6] Dr. Lichtman examined contests between black and

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[6]Dr. Lichtman described regression analysis as the "standard method for inferring the behavior of population groups from data collected for political units." Defendants do not dispute this. The role of this statistical methodology in Voting Rights Act cases has been explained in this manner:

> Correlation and regression analysis is used to determine the degree of relationship between two variables, such as the racial composition of the precincts in a city or district and the electoral support provided a particular candidate or group of candidates within those precincts. The independent variable in the analysis is a summary measure of the race of the voters in each precinct (usually the percentage of blacks among the total

white candidates for State Representative from District 48-49 in 1978, 1986, and 1988. He also studied the results from Crittenden County in the 1988 Democratic presidential primary, and mayoral elections in the cities of West Memphis (1982 and 1986) and Earle (1985 and 1986).

Among black voters, the mean level of support for the black candidates in these nine races was eighty-nine percent. The mean level of support among whites for these black candidates was nine percent. Excluding the mayoral contests, the mean level of support for black candidates was ninety-seven percent among black voters; the mean level of support for black candidates among white voters was nine percent.

The levels of support for black candidates by black and white voters in three State Representative races from District 48-49 are of particular interest to the Court. In the 1988 primary election for State Representative, an estimated one hundred percent of black voters supported the black candidate, McGee; ninety-three percent of white voters supported the white candidate, Stockley. In 1986 ninety-five percent of black voters supported the black candidate, and eighty-five percent of white voters supported the white candidate. In 1978 the black candidate collected the votes of ninety-nine percent of black voters and the white candidate got the votes of niney-two percent of white voters.

The evidence also indicates that the Rev. Jesse Jackson,

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[6]*cont'd*

> population, voting age population, or registered voters). The dependent variable is the percentage of voters in each precinct casting ballots for the specific candidate or group of candidates.
>
> . . . Correlation and regression analysis provides statistical coeffecients that summarize the consistency and strength of the relationship between the two variables.

Engstrom & McDonald, *Quantitative Evidence in Vote Dilution Litigation: Political Participation and Polarized Voting*, 17 Urb. Lawyer 369, 374-75 (1985).

the black candidate in the Democratic presidential primary, in 1988 received ninety-four percent of the votes of blacks in the county and five percent of the votes of whites. In races for mayor of West Memphis, the largest city in the district, the black candidate received ninety-six percent of votes cast by blacks in 1986 and an estimated one hundred percent of the votes cast by blacks in 1982. In both of these races, the estimated percentage of whites voting for the black candidate was zero.

Supplementing his regression analysis with extreme-case, or homogeneous-precinct analysis, Dr. Lichtman testified that in precincts with ninety percent or more black population, the black State Representative candidates received ninety-five percent of the vote in 1988, eighty-nine percent of the vote in 1986, and eighty-seven percent in 1978. In precincts that were ninety percent or more white, black candidates received fourteen percent of the vote in 1988, twenty-one percent in 1986, and nine percent in 1978.

Dr. Harold Stanley, the expert witness for the defendants, testified that the figures derived from his own regression analysis of voting returns in Crittenden County were "substantially close" to those collected by Dr. Lichtman for the same elections, those between black and white candidates. Dr. Stanley further testified, however, that focusing only on races involving black candidates against whites does not present an accurate picture of voting in the jurisdiction. Accordingly, the defendants offered evidence indicating that (1) considering most county-wide races and races for mayor in West Memphis and Earle in the last twelve years, blacks and whites most often voted together to elect candidates of their collective choice; and (2) the preferred candidate of black voters most often finished first within the jurisdiction.

Dr. Stanley analyzed sixty-five races between 1976 and 1988 and determined that in fifty-four of these elections the candidate receiving a majority of the votes cast by blacks placed

first in Crittenden County. He also calculated that in all of these elections combined, first-place finishers received sixty-five percent of the vote of blacks; by comparison, fifty-six percent of the votes cast by whites went to the ultimate first-place finisher within the county.

On the basis of this study, Dr. Stanley testified that the overall pattern in Crittenden County is that blacks and whites usually vote together, and the candidates preferred by blacks often place first. The defendants also presented evidence that, in State Representative campaigns between white candidates, a majority of black voters supported the winning candidate on four of five occasions.

The plaintiffs have objected to the admissibility of much of the defendants' evidence, on the grounds of relevance. In particular, they say that only evidence involving races between black and white candidates can be considered. We assume without deciding that all of the evidence offered by the defendants is admissible and properly to be considered. We make this assumption because the result in this case would be the same either way.

First, we believe it is proper to give considerable weight to the evidence of polarization in elections between black and white candidates. In *Thornburg*, the Supreme Court relied heavily on such evidence. 106 S. Ct. at 2771-72. Further, in a functional assessment of the political process, one of the most important factors is the extent to which members of the minority group have been elected to office in the jurisdiction. *Id.* at 2766 n.15. Whether our assessment of the political realities in Crittenden County is expressed in terms of "black candidates" or "candidates preferred by black voters," our conclusion is still that "minority group members prefer certain candidates whom they could elect were it not for the interaction of the [multimember] structure with a white

majority that votes as a significant bloc for different candidates," *id.* at 2776 (opinion of Brennan, J.).

Second, the most probative indication of vote dilution stemming from the multimember structure of the district is the results of the State Representative elections. This case is about a particular electoral structure and its effect on minority participation. Certainly, there is evidence that white candidates preferred by black voters sometimes win in elections involving only whites. The evidence of polarized voting in State Representative elections involving blacks against whites is so strong, however, that it cannot be overcome even when all reasonable inferences are accorded to the evidence of elections involving only white candidates.

The defendants have offered evidence of other reasons, such as incumbency, for the choices made by voters in the district. The materiality of this evidence is questionable. See *Thornburg*, 106 S. Ct. at 2773 (focus of case under Voting Rights Act is difference in choices made by voters, not reasons for this difference) (opinion of Brennan, J.). In any event, we assume for present purposes that this evidence may have some bearing on whether the particular election results on which we focus stem from the multimember structure of the district. We find this evidence insufficient to compel a different result in this case, given the sharp polarization in races involving black candidates for State Representative. Nor are we persuaded by evidence of some success by black candidates in school-board elections or other local races, because the electoral structure at issue here has no effect on these candidates.

We find, therefore, that there is racially polarized voting in the district, despite the fact that blacks and whites often pefer the same candidate in races involving only whites. The purpose of our inquiry into polarized voting is twofold: "to ascertain whether minority group members constitute a politically cohesive unit and to determine whether whites vote

sufficiently as a bloc usually to defeat the minority's preferred candidates." *Id.* at 2769. Upon consideration of all the evidence offered by both parties, we find that there is racially polarized voting in Crittenden County and District 48-49; black voters usually vote cohesively, as a unit; and white voters have the strength under the present multimember structure to enable them to frustrate the choices made by black voters.

C.

We make the following additional findings:

(1) The Court takes judicial notice that there is a history of racial discrimination in the electoral process in Arkansas. See *Perkins v. City of West Helena*, 675 F.2d 201, 211 (8th Cir.), *aff'd mem.*, 459 U.S. 801 (1982). We do not believe that this history of discrimination, which affects the exercise of the right to vote in all elections under state law, must be proved anew in each case under the Voting Rights Act.

(2) We further find that the history of discrimination has adversely affected opportunities for black citizens in health, education, and employment.[7] The hangover from this history necessarily inhibits full participation in the political process.

(3) State law has no provision forbidding "bullet" or "single-shot" voting, but the effectiveness of any such practice

[7]The plaintiffs' evidence shows, for example, that the per capita income of blacks in the county was $2,293 according to the 1980 census, about one-third that of white residents. In 1980, 58.6% of blacks in the county had income below the poverty level (and 10.7% of whites); 19.6% of blacks over 25 were high school graduates (and 61.4% of whites); and the median value of homes owned by blacks was $16,700 (and $39,200 for whites). "[C]ourts have recognized that political participation by minorities tends to be depressed where minority group members suffer effects of prior discrimination such as inferior education, poor employment opportunities, and low incomes." *Thornburg*, 106 S. Ct. at 2776 (citations omitted) (opinion of Brennan, J.).

would be negated by the requirement that candidates run for designated seats. Arkansas law requires candidates for state representative to secure a majority of votes in a primary election in order to become the party nominee. This district does not seem to us unusually large, as multimember districts go. There is no subdistrict residency requirement. No evidence as to any slating process has been presented.

(4) The plaintiffs have offered no evidence of discriminatory intent in the formation of District 48-49, and we necessarily find on this record that there was no such intent. Plaintiffs have not proved a claim under the Constitution.

(5) Neither side has presented convincing evidence about the voter-registration rates of the respective races.

(6) The plaintiffs have not attempted to demonstrate lack of responsiveness to the needs of black citizens on the part of officials in the district. The defendants have presented evidence which indicates that county officials have been responsive to some of the concerns particular to blacks and have made attempts to make the political process accessible to blacks. Accordingly, we find no present lack of responsiveness to the needs of blacks has been shown. State policy with respect to multimember districts (26 members of the House chosen from such districts, and no Senators) is not tenuous, but neither is it especially strong.

(7) The evidence does not indicate that overt or subtle racial appeals have been made.

V.

The Supreme Court has held that the most important factors in a Voting Rights Act challenge to a multimember district are racial polarization in voting and whether minority-

group members have won elections in the jurisdiction in question — here, District 48-49. *Thornburg*, 106 S. Ct. at 2766 n.15. Other factors listed in the Senate Report, if present, "are supportive of, but *not essential to*, a minority voter's claim." *Ibid.* (emphasis in original). Plaintiffs have presented strong, perhaps overwhelming, proof of the essential elements of their claim. Some of the other factors favor plaintiffs, some do not, and some are just not in the case. On balance, we find that the multimember configuration of District 48-49 deprives black citizens of an equal opportunity to participate in the political process and to elect candidates of their choice. So long as the present situation is allowed to continue, there will probably never be a black State Representative from Crittenden County, even though, as detailed above, black citizens are numerous enough to have a clear majority in a single-member district. Candidates favored by blacks can win, but only if the candidates are white.

Accordingly, the result of the March 8, 1988, primary election for State Representative in District 48-49 is hereby set aside. Defendants are restrained and enjoined from certifying the winners of that primary as party nominees. The defendant members of the State Board of Apportionment and the plaintiffs are ordered to submit proposed plans for separate Districts 48 and 49 on or before May 27, 1988.[8] This Court will convene on June 6, 1988, to consider these plans.

It is so ordered.

A true copy.

Attest:

/s/ Carl R. Brents
Clerk, U.S. District Court, Eastern District of Arkansas.

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[8]An order to this effect was entered on May 2, 1988. At trial counsel for defendants stated that ten days would be enough time for them to prepare a plan.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

Elbert Smith, Vickie Miles Robertson, Johnny Mae Williams, Maxine Bohannon, Carolyn Stephenson, Ester Cage, Faye Williams, Darrick Handy, Anthony R. Holmes, Carol Holmes, and Maggie Hall, on behalf of themselves, and all others similarly situated ..... *Plaintiffs*

vs. CIVIL ACTION NO. LRC 88-29

Bill Clinton, Governor of Arkansas; Bill McCuen, Secretary of State of Arkansas; and Steve Clark, Attorney General of Arkansas, in their respective official capacities and in their official capacities as members of the Board of Apportionment of the State of Arkansas; Lilburn W. Carlisle, Chairperson of the Arkansas State Committee of the Democratic Party; Tommye S. Givens, Secretary of the Arkansas State Committee of the Democratic Party; Ed Bethune, Chairperson of the Arkansas State Committee of the Republican Party; and Phyllis Kincannon, Secretary of the Arkansas State Committee of the Republican Party ..... *Defendants*

Before ARNOLD, Circuit Judge, HARRIS, Senior District Judge, and WOODS, District Judge.

PER CURIAM.

The motion of defendants to dismiss for failure to state a

claim or, in the alternative, for a new trial, is denied for the reasons stated in open court at the hearing on June 6, 1988.

Having heard evidence and arguments of counsel, the Court adopts and approves the districting plan submitted by plaintiffs, which was introduced in evidence at the hearing on June 6 as Plaintiff's Exhibit 1R.

Counsel for plaintiffs is directed to submit a proposed form of final judgment on or before June 16, 1988, and defendants may have to and including June 23, 1988, to object to or comment on the form.

It is so ordered this 6th day of June, 1988.

FOR THE COURT:
/s/ Richard S. Arnold
United States Circuit Judge.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

Elbert Smith, Vickie Miles Robertson, Johnny Mae Williams, Maxine Bohannon, Carolyn Stephenson, Ester Cage, Faye Williams, Darrick Handy, Anthony R. Holmes, Carol Holmes, and Maggie Hall, on behalf of themselves, and all others similarly situated..... *Plaintiffs*

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Bill Clinton, Governor of Arkansas; Bill McCuen, Secretary of State of Arkansas; and Steve Clark, Attorney General of Arkansas, in their respective official capacities and in their official capacities as members of the Board of Apportionment of the State of Arkansas; Lilburn W. Carlisle, Chairperson of the Arkansas State Committee of the Democratic Party; Tommye S. Givens, Secretary of the Arkansas State Committee of the Democratic Party; Ed Bethune, Chairperson of the Arkansas State Committee of the Republican Party; and Phyllis Kincannon, Secretary of the Arkansas State Committee of the Republican Party ..... *Defendants*

Before ARNOLD, Circuit Judge, HARRIS, Senior District Judge, and WOODS, District Judge.

ARNOLD, Circuit Judge.

On July 1, 1988, this Court entered its final judgment in

this vote-dilution case under Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973. This opinion explains our reasons for the particular form of judgment we have entered.

We had previously held that plaintiffs, black registered voters in Crittenden County, Arkansas, had demonstrated that at-large election of State Representatives from dual-member District 48-49 denied them an equal opportunity to participate in the political process. We ordered that the March 8, 1988, primary election for State Representatives be set aside, and that a plan to divide District 48-49 into separte districts be implemented in time for a special primary election to be held before the November 1988 general election. ___ F. Supp. ___ (E.D. Ark. 1988).

Following this decision, we gave the parties an opportunity to submit their proposals for dividing the District into two similarly sized, contiguous districts. Only the plaintiffs submitted a plan. Our judgment has accepted this proposed plan and ordered it into effect, even though the defendants objected to the high percentage of black voters in the new District 48. We have done so because there is convincing authority that historically disadvantaged minorities require more than a simple majority in a voting district in order to have the Voting Rights Act remedy to which they are entitled — a practical opportunity to elect candidates of their choice.

Under the plaintiffs' proposed remedy, District 48 will have a total population of 23,066, with black residents making up 14,975 of this number (about 65%). District 49 will have 22,861 in total population, with white residents accounting for 18,567 (81%). In terms of voting-age population, blacks will make up 60.55% of the residents in District 48, representing 8,470 persons out of 13,989. The percentage of blacks of voting age will be less than 16% in District 49, where whites make up 13,008 of the 15,497 people old enough to register to vote.

Not only have the defendants declined to submit a plan of their own, but they have chosen not to say whether, given the desired balance of size and population between the districts, it is feasible to create a district that they would find preferable. They simply maintain that any plan affecting only District 48-49 would interfere with the statewide scheme of apportionment. We rejected this argument as a defense to the plaintiffs' case on the merits, and we do not accept it here as a reason to disapprove the plaintiffs' plan. Defendants also argue that plaintiffs' evidence fails to justify what they call a "supermajority" black district.

We recognize that this Court has an independent obligation to order a remedy that is appropriate to the violation that has been shown. Accordingly, we have carefully examined plaintiffs' plan to see whether it complies with principles of equity and efficacy established by cases under the Voting Rights Act.

In shaping a remedy under the Voting Rights Act, this Court must "exercise its traditional equitable powers to fashion the relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice." S. Rep. No. 417, 97th Cong., 2d Sess. 31 (1982), *reprinted in* 1982 U.S. Code Cong. & Ad. News 177, 208 (footnote omitted). It is widely understood that "minorities must have something more than a mere majority even of voting age population in order to have a reasonable opportunity to elect a representative of their choice." *Ketchum v. Byrne*, 740 F.2d 1398, 1413 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985). Moreover, the extent to which minorities must outnumber whites in the relevant jurisdiction is a matter of "general acceptance in redistricting jurisprudence." *Id.* at 1415-16 (citing cases).

A guideline of 65% of total population is frequently used,

and is derived by supplementing a simple majority with an additional 5% to offset the fact that minority population tends to be younger than that of whites, 5% for the well-documented pattern of low voter registration, and 5% for low voter turnout among minorities. When voting-age population figures are used, a 60% nonwhite majority is appropriate. *Id.*[1]

Defendants suggest that there is no basis for correctives in this case because there was no convincing evidence before the Court of low registration or participation among blacks in Crittenden County. We think this Court is entitled to consider the "generally . . . lower voter registration and turnout characteristics" of minorities, *Ketchum*, 740 F.2d at 1413,[2] especially when there is nothing to indicate that the general pattern does not apply in Crittenden County, and the factors underlying this pattern exist in great measure in the county.[3]

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[1]We are aware that one reason for the 65%-of-total-population-guideline in *Ketchum* is that the case involved a form of Voting Rights Act violation called retrogression, in which there is a decrease in the absolute number of representatives a minority group may expect to elect, 740 F.2d at 1402, and the appellate court thought it equitable to restore blacks to majority percentages approaching those they had before redistricting took place. We do not think this circumstance renders the reasoning of the case inapplicable, because the Court's stated objective was to give the plaintiffs an effective majority in the relevant districts. *Id.* at 1419.

[2]The Seventh Circuit referred to national voter registration and turnout statistics from the 1980 census to illustrate this circumstance. *Ketchum*, 740 F.2d at 1413 n.16.

[3]We think it is reasonable to infer lower registration and participation when, for example, in 1980 fewer than 20% of blacks in Crittenden County over the age of 25 were high school graduates, and almost 60% of blacks in the county lived below the poverty level. The percentages for whites were 61.4% high school graduates and 10.7% below the poverty level. Plaintiffs' Exhibit 2. *See Ketchum*, 740 F.2d at 1413-14 (some of the voter problems stem from low income, low economic status, high unemployment, poor education and high mobility).

When reliable voting statistics are not available, "judicial experience can provide a reliable guide to action." *Id.* at 1415. A district court may base its remedy on data in the record or use a "uniform corrective." *Id.* at 1419. Further, as plaintiffs point out, the defendants' summary of voting patterns entered in evidence at trial shows that black turnout as a percentage of total black population was lower than that of whites in every one of the sixty-five contests analyzed, by an average of nine percent. Def. Exhibit 7.

Accordingly, we believe a corrective majority in black voting age population is in order. We adopt the plan proposed by the plaintiffs, which will result in District 48's having a majority black population of 60.55% among residents of voting age. This will give blacks a fair opportunity to elect the candidate of their choice to the Arkansas House of Representatives, and help to eradicate the effect of the dual-member, at-large system on participation by blacks in the political process.

FOR THE COURT:

/s/ Richard S. Arnold
United States Circuit Judge.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

Elbert Smith, Vickie Miles Robertson, Johnny Mae Williams, Maxine Bohannon, Carolyn Stephenson, Ester Cage, Faye Williams, Darrick Handy, Anthony R. Holmes, Carol Holmes, and Maggie Hall, on behalf of themselves, and all others similarly situated ..... *Plaintiffs*

vs. CIVIL ACTION NO. LRC 88-29

Bill Clinton, Governor of Arkansas; Bill McCuen, Secretary of State of Arkansas; and Steve Clark, Attorney General of Arkansas, in their respective official capacities and in their official capacities as members of the Board of Apportionment of the State of Arkansas; Lilburn W. Carlisle, Chairperson of the Arkansas State Committee of the Democratic Party; Tommye S. Givens, Secretary of the Arkansas State Committee of the Democratic Party; Ed Bethune, Chairperson of the Arkansas State Committee of the Republican Party; and Phyllis Kincannon, Secretary of the Arkansas State Committee of the Republican Party ..... *Defendants*

Before ARNOLD, Circuit Judge, HARRIS, Senior District Judge, and WOODS, District Judge.

JUDGMENT

This Court having filed its opinion on the merits of this

case on May 16, 1988; an evidentiary hearing with respect to the remedy having been held on June 6, 1988; the Court having announced from the bench at the conclusion of that hearing its decision to adopt the remedial plan proposed by plaintiffs; plaintiffs having submitted a proposed form of final judgment; defendants having submitted their comments with respect to this form; and the Court being well and sufficiently advised in the premises;

It is now therefore by the Court CONSIDERED, ORDERED, ADJUDGED, AND DECREED:

1. That the multimember district for electing members of the Arkansas House of Representatives from District 48-49 be, and it is hereby, declared to be in violation of §2 of the Voting Rights Act, 42 U.S.C. §1973, and that defendants therefore be, and they are hereby, restrained and enjoined from conducting any further elections for seats in the Arkansas House of Representatives from that legislative district.

2. That the March 8, 1988, party primary from the multimember district, District 48-49, be, and it is hereby, declared null and void, insofar as it relates to the race for the Arkansas House of Representatives.

3. In order to remedy the violation of §2 of the Voting Rights Act, the Court hereby adopts the proposed single-member redistricting plan presented by the plaintiffs. This plan is described in exhibit 1 attached to this order, which is incorporated herein by reference. The Court finds that the plan complies with the one-person, one-vote principle of the Fourteenth Amendment and is necessary to cure the dilution of black voting strength caused by the existence of the prior multimember District 48-49. The Court adopts this plan after having given both the plaintiffs and the defendants an adequate opportunity to submit proposed remedial redistricting plans, and after holding a hearing on June 6, 1988, to

consider the question of an appropriate remedy. Defendants did not submit a proposed plan. Nor did they offer any additional evidence at the June 6, 1988, hearing. They chose instead to rely on the evidence already submitted during the April 25-26, 1988, hearing held on the liability phase of this suit.

4. At the June 6, 1988, hearing, the Court indicated its intention to order a special primary election under the court-adopted single-member redistricting plan so that nominees could be chosen in time for the regularly scheduled November 8, 1988, general election. The Court asked the defendants which dates would be preferable, and the defendants suggested September 13, 1988, for the first primary election and September 27, 1988, for any primary run-off, should a run-off be necessary. The plaintiffs concurred in those dates. A review of Act 969 of 1987, codified as Ark. Code Ann. §6-14-102 (1987), however, reveals that the annual school elections will be held in each school district of the state on the third Tuesday in September, which will be September 20, 1988. Accordingly, the defendants, their agents, servants, employees, and all persons working in concert with them, are directed to hold a special primary election for state representatives from the districts established by this judgment on September 20, 1988, and a primary run-off, should one be necessary, on October 4, 1988.

5. The Court adopts a candidate qualifying period in conformity with the provisions of the laws of the State of Arkansas, which require that the candidate qualifying period be left open for 14 days, and that the period close 40 days prior to the election. Accordingly, the candidate qualifying dates of July 28 through August 11 shall be adopted by the defendants, their agents, servants, employees, and all persons working in concert with them, for the conduct and operation of the special primary election or elections required by this judgment.

6. In accordance with Rule 19(a) of the Federal Rules of

Civil Procedure, the following parties are added as defendants in order to effectuate the relief mandated by this order and judgment: the Democratic Central Committee of Crittenden County, Arkansas, its officers and members; the Republican Central Committee of Crittenden County, Arkansas, its officers and members; and the Election Commission of Crittenden County, Arkansas, its officers and members. At such time as these defendants are duly served with process and have had an opportunity to be heard, the Court shall determine what relief, if any, is necessary or appropriate with respect to them.

7. The Court reiterates its holding that this case concerns only legislative District 48-49.

8. The Court retains jurisdiction for the purposes of enforcing this decree, and for such other purposes as may be necessary. In addition, the managing judge of this case shall retain jurisdiction in order to consider any application for attorneys' fees and costs.

9. The Clerk is directed to enter this judgment in the manner described in Fed. R. Civ. P. 79(a).

It is so ordered this 1st day of July, 1988.

FOR THE COURT:

/s/ Richard S. Arnold
United States Circuit Judge.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

Elbert Smith, et al ..... *Plaintiffs*

V. NO. LR-C-88-29

Bill Clinton, Governor of Arkansas; Bill McCuen, Secretary of State of Arkansas; and Steve Clark, Attorney General of Arkansas, in their respective official capacities and in their official capacities as members of the Board of Apportionment of the State of Arkansas; Lilburn W. Carlisle, Chairperson of the Arkansas State Committee of the Democratic Party; Tommye S. Givens, Secretary of the Arkansas State Committee of the Democratic Party; Ed Bethune, Chairperson of the Arkansas State Committee of the Republican Party; and Phyllis Kincannon, Secretary of the Arkansas State Committee of the Republican Party; the Democratic Central Committee of Crittenden County, Arkansas, its officers and members; the Republican Central Committee of Crittenden County, Arkansas, its officers and members; and the Election Commission of Crittenden County, Arkansas, its officers and members ..... *Defendants*

JOINT NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that, pursuant to Supreme Court Rule 10.3, Bill Clinton, Bill McCuen, Steve Clark, Lilburn W. Carlisle, Tommye S. Givens, the Democratic Central Committee of Crittenden County, Arkansas, its officers and members; the Republican Central Committee of Crittenden

County, Arkansas, its officers and members; and the Election Commission of Crittenden County, Arkansas, its officers and members, above named defendants, hereby jointly appeal to the Supreme Court of the United States from the final judgment entered by the three-judge court in this action on July 1, 1988.

This appeal is taken pursuant to Title 28, U.S.C. §1253.

Respectfully submitted,

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Attorney General

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Attorneys for Defendants

CERTIFICATE OF SERVICE

I, Frank J. Wills, III, Assistant Attorney General, do hereby certify that I have served the foregoing by mailing a copy of same, U.S. Mail, postage prepaid, to Reginald Robertson, East Arkansas Legal Services, 402 Franklin, Helena, Arkansas 72342; Ben Thomas Cole, II, East Arkansas Legal Services, P. O. Box 1149, West Memphis, Arkansas 72301; Victor Hill, East Arkansas Legal Services, 114 E. Main, Blytheville, Arkansas 72315; John Walker, 1723 Broadway, Little Rock, Arkansas 72206; and to Robert B. McDuff, William L. Robinson, Frank R. Parker, Samuel Issacharoff, Lawyers Committee for Civil Rights Under Law, 1400 "I" Street, N.W., Suite 400, Washington, D.C. 20005, on this 29th day of July, 1988.

/s/ Frank J. Wills, III